Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 07-

IN THE
Supreme Court of the United States

JOSHUA LEWIS JOHNSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

LYLE J. YURKO
Attorney for Petitioner
YURKO & ASSOCIATES, P.A.
402 W. Trade St., Ste. 101
Charlotte, NC 28202
(704) 347-0407

212958

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Did the post-conviction court err in denying, without a hearing, Petitioner's claim that his trial lawyer rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States when counsel failed to file a Notice of Appeal, as instructed by Petitioner, from a judgement imposing an active term of imprisonment upon Petitioner and should the Petition for Certiorari be allowed by this Court?

II. Did the post-conviction court err in rejecting, without a hearing, Petitioner's claim that the entry of his guilty plea violated the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, because at the time of the entry of plea, Petitioner was under the influence of drugs so that his guilty plea was not voluntary and should the Petition for Certiorari be allowed by this Court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the Judgement of the Superior Court of Rowan County, Judicial District 19C of the State of North Carolina.

OPINIONS BELOW

The Order of the Superior Court for Rowan County, Judicial District 19C of North Carolina is unpublished and is provided in Petitioners Appendix A. The order denying the Petition for Certiorari in the North Carolina Court of Appeals is unreported and is provided in Petitioner's Appendix B. The Order dismissing the Petition of Certiorari in the North Carolina Supreme Court is reported at __ N.C. __; __S.E. 2d __; WL 30 53 681 (2007) and is provided in Petitioner's Appendix C.

STATEMENT OF JURISDICTION

The Supreme Court of North Carolina entered an order dismissing Petitioner's state petition for a writ of certiorari to review the Order of the Superior Court of Rowan County, Judicial District 19C of the State of North Carolina on October 11, 2007. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Constitutional Provisions involved are the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment to the Constitution of the United States and these provisions are provided in Petitioner's Appendix E.

STATEMENT OF THE CASE

This Petitioner was indicted for Second Degree Rape, Second Degree Sexual offense, Intimidating a State's witness and First Degree kidnaping occurring on November 9, 2003. (Pet. App. A p.1a) On May 25, 2005, a hearing was held on evidentiary motions prior to trial. (Pet. App. A p.2a) The accuser, an ex-girlfriend of petitioner, had recent to the accusations, allowed another boyfriend to video tape their love making. (Pet. App. D p.13a) When the boyfriend refused to handover the video, the paramour threatened that boyfriend with rape allegations. (Pet. App. D p.13a) However, the trial judge ruled this evidence was would not be admitted (Pet. App. A p. 2a and Pet. App. D p. 14a) in Petitioner's trial even though the same Court found that Petitioner's prior conviction for fighting with law officers would be admitted.

When trial counsel painted a gloomy picture of the prospects of the trial's outcome and left to negotiate a plea agreement with the prosecution, (Pet. App. D p.15a) the Petitioner was emotionally distraught and took several dosages of the muscle relaxer "Xanax". (Pet. App. D p.15a) The prosecutor offered a plea to a lesser sexual assault. (Pet. App. D p.11a) However, the plea required an active term of imprisonment of 46-65 months. (Pet. App. A 1a) Petitioner is presently serving this sentence. (Pet. App. A p.1) The trial lawyer urged Petitioner to accept the plea and plea proceedings were conducted. (Pet. App. D p.15a) By the time that Petitioner actually entered his plea, he was incoherent as a result of his intoxication and cannot now recall the specifics of those proceedings. (Pet. App. D p. 15a)

When his head cleared the following day, he telephoned his mother and told her to inform his lawyer that he either wanted to withdraw his plea or enter Notice of Appeal. (Pet. App. D pp. 15a-16a) His mother called the trial lawyer and told him of her son's instructions. (Pet. App. D pp. 15a-16a) The Trial lawyer stated he would visit the Petitioner to discuss the instructions but no visit ever occurred. (Pet. App. D p.16a) As a result a withdrawal motion was not timely filed and Notice of Appeal was not timely entered. (Pet. App. D p.16a)

A few months thereafter, Petitioner's parents hired new counsel and new counsel prepared and filed a timely and procedurally correct post-conviction motion before The Superior Court. (Pet. App. D) This Motion for Appropriate Relief, filed on May 19, 2006, raised claims of ineffective assistance of counsel and violations of Due Process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and reported the pertinent facts reiterated above. (Pet. App. D)

The post-conviction Court entered an Order denying the motion absent an evidentiary hearing, on August 16, 2006. (Pet. App. A)

Petitioner filed successive Petitions for Writ of Certiorari in the North Carolina Court of Appeals and the North Carolina Supreme Court, on January 17, 2007 and September 5, 2007 respectively. On February 6, 2007, The North Carolina Court of Appeals denied the Petition for Certiorari. (Pet. App. B) On October 11, 2007, the North Carolina Supreme Court also failed to grant the

Petition for Certiorari. (Pet. App. C) Within ninety days from the date of the adverse action taken upon these constitutional claims by the North Carolina Supreme Court, the state tribunal of last resort for this Petitioner, Petitioner files this Writ of Certiorari before this Court, requesting relief from these Constitutional deprivations.

REASONS FOR GRANTING THE PETITION

I. The Post-Conviction Court erred in denying without a hearing, Petitioner's claim that his trial lawyer rendered ineffective assistance of counsel in violation of the Sixth Amendments to the Constitution of the United States when counsel failed to file a Notice of Appeal, as instructed by Petitioner, from a judgement imposing an active term of imprisonment upon Petitioner.

In Criminal proceedings, the accused enjoys the right to effective assistance of counsel, secured by the Sixth and Fourteenth Amendments to the United States Constitution. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). This Court has established that ineffective assistance occurs when counsel's performance is deficient and the client is prejudiced which normally must lead to a finding that there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984)

However, this Court has repeatedly held that a lawyer who disregards a client's instructions to file an appeal establishes ineffective assistance of counsel per se and it need not be demonstrated that the Appeal would likely have resulted in a successful outcome for the

appellant. *Rodriguez v. United States*, 395 U.S. 327, 330 (1969); *Roe v. Florez*, 528 U.S. 470, 477 (2000).

This petitioner remains a victim of small town, back woods, good old boy, southern justice. The elected District Attorney choose to proceed with a prosecution based only on an uncorroborated claim of sexual assault by Petitioner's ex-girlfriend. (Pet. App. D p.11a) This paramour had, recent to these allegations, allowed another boyfriend to videotape their lovemaking. (Pet. App. D p.13a) When the second boyfriend refused to surrender the video, the paramour threatened him with rape charges. (Pet. App. D p.13a) But the elected trial judge ruled these facts irrelevant to Petitioner's sexual assault trial even though Petitioner's prior misdemeanor involving fighting with law enforcement was found to be admissible by the same Trial Court. (Pet. App. A. p.2a and D p.14a)

After these pretrial proceedings, Petitioner's trial counsel painted a gloomy portrait of the trial's outcome and urged the Petitioner to accept a plea arrangement. (Pet. App. D p.15a) The plea to attempted sexual assault required an active term of imprisonment and its collateral consequences included registration as a sex offender upon release. (Pet. App. D p.11a)

Terrified at the prospect of pleading guilty and incarceration for a crime he did not commit, the petitioner, immediately prior to the plea proceedings, ingested multiple dosages of the muscle relaxer "Xanax" which caused him to be incoherent and presently he cannot recall the plea proceedings. (Pet. App. D p.15a)

However, his plea was accepted and he now is imprisoned. (Pet. App. A p.2a)

After receiving an active sentence of 46-65 months incarceration, the Petitioner cleared his mind and called his mother and asked her to contact his lawyer to instruct him to file the necessary documents regarding withdrawal of his plea or entering an appeal. (Pet. App. B p. 5) Petitioner's mother immediately contacted trial counsel and told counsel that Petitioner wanted to withdraw his plea or enter an appeal. (Pet. App. D pp. 15a-16a) Counsel stated that he would visit the Petitioner at the jail to discuss this matter but the visit never occurred. (Pet. App. D p. 16a) Thus, the withdrawal Motion and the Notice of Appeal were not timely filed. (Pet. App. D p.16a) A few months thereafter, Petitioner's parents hired new counsel and timely, procedurally valid post-conviction claims were instituted in the appropriate Superior Court where the Plea proceedings had occurred. (Pet. App. D)

The post trial Court summary rejected the Petitioner's claims that his trial counsel did not provided effective assistance of counsel by failing to enter Notice of Appeal as instructed by the Petitioner and by failing to file a Motion to Withdraw the plea as instructed. (Pet. App. A) No hearing was held regarding these matters. (Pet. App. A)

The Petitioner timely sought discretionary review of this ruling in the North Carolina Court of Appeals and in the North Carolina Supreme Court. However, such a review was not granted in either Appellate tribunal. (Pet. App. B and C) Petitioner now comes before

this Court and asks for a relief from these Constitutional deprivations.

In Sanders v. United States, 373 U.S. 1, 19-20 (1963), this Court held that an evidentiary hearing is required when a Constitutional claim cannot be resolved by a review of the proceedings below when the facts upon which the claim is based are outside of the record. *Id.* at 20. Numerous Appellate courts have consistently reiterated that when a credible claim of a constitutional deficiency is based on facts outside of the record, the post-conviction Court must conduct an evidentiary hearing on the claim. *United States v. Booth*, 432 F.3d 542, 546 (3rd Cir. 2005); *United States v. Weatherwax*, 20 F. 3d 572, 560 (3rd Cir. 1994); *United States v. White*, 366 F. 3d 291, 297 (4th Cir. 2004); *Bumgardner v. United States*, 758 F. 3d 1292, 1293 (8th Cir. 1985); and *Arnold v. United States*, 63 F. 3d 778, 781 (9th Cir. 1994); (hearing required on claim the counsel did not file Appeal as instructed).

The rulings of the North Carolina Appellate Courts also mandate a hearing to resolve Constitutional claims that do not appear of record. *State v. Hardison*, 126 N.C. App. 52, 54, 483 S.E. 2d 459, 461 (1997); *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E. 2d 719, 721, (1985). (Both regarding ineffective assistance of counsel claims.)

This Court has continually held what when counsel does not enter Notice of Appeal as instructed by his client, no other showing of prejudice is required to establish a valid Sixth Amendment claim. *Rodriguez v. United States*, supra; and *Roe v. Florez*, supra. The various Circuit Courts have repeatedly reiterated this

principle of Constitutional jurisprudence. *Campusano v. United States*, 442 F.3d 770, 776 (2nd Cir. 2006); *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 2001); *United States v. Johnson*, 196 F.3d 802, 806 (7th Cir. 1999); *United States v. Snitz*, 342 F.3d 1154, 1156 (10 Cir. 2003); and *Martin v. United States*, 82 F.3d 1083, 1084 (11th Cir. 1996).

The Appellate Courts have also found that counsels' failure to file post trial motions, including motions to withdraw a guilty plea, also may give rise to viable Sixth Amendment claims so long as actual prejudice is established. *United States v. Colon-Torrez*, 382 F.3d 76, 91 (1st Cir. 2004) (withdraw plea); *Baldayaque v. United States*, 338 F.3d 145, 152 (2nd Cir. 2003); *United States v. Nino*, 878 F.2d 101, 104 (3rd Cir. 1989); *Crowe v. Sowders*, 854 F.2d 430, 434, (6th Cir. 1989); *Belford v. United States*, 975 F.2d 310, 315 (7th Cir. 1992) (withdraw plea); *United States v. Hilliard*, 392 F.3d 981, 986 (8th Cir. 2004); *United States v. Jimenez-Recio*, 258 F.3d 1069, 1074 (9th Cir. 2001) and *Lucero v. Kirby*, 9 F.3d 1520, 1522 (10th Cir. 1993) (withdraw plea). Here, the petitioner has sufficiently alleged the requisite prejudice because his plea was subject to withdrawal since it was entered when he was under the influence of drugs. (App. Pet. B p.5)

Because Petitioner raised timely, procedurally correct claims that his trial counsel failed to enter Notice of Appeal and failed to move to withdraw his plea after Petitioner requested that he do so, he has established a valid basis for Constitutional error below and therefore, he is entitled to an evidentiary hearing to produce the necessary facts to establish these Sixth Amendment deprivations. Therefore, this Court should remand this

matter to the Post-Conviction Court below with instructions to conduct the mandated hearing.

II. The Post-Conviction Court erred in denying without a hearing, Petitioner's claim that the entry of his guilty plea violated the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, because at the time of the entry plea, Petitioner was under the influence of drugs so that his guilty plea was not voluntary.

Consistently, this Court has held that a guilty plea operates as a waiver of important rights, and it is valid only if accomplished voluntarily, knowingly, and intelligently. *Bradshaw v. Stumf*, 547 U.S. 175, 183, 125 S. Ct. 2398, 240 5 (2005); *Godinez v. Moran*, 509 U.S. 389, 400-401 (1993); *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

When a defendant alleges intoxication at the time of plea, a constitutional Due Process inquiry arises pursuant to rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States because such a guilty plea is not voluntary. *See Sanders v. U.S.*, 373 U.S. 1, 19-20 (1963).

However, as a variety of Appellate courts have held, mere drug or alcohol use counterparaneous with the entry of a guilty plea is not controlling, rather, the defendant must demonstrate that the intoxication was significant so that he was not in control of his faculties to the extent that he was incapable of comprehending his constitutional rights and of understanding the

consequences of his plea. *United States v. Truglio*, 493 F.2d 574, 578 (4th Cir. 1974). See also *United States v. Cole*, 813 F.2d 43, 46 (3rd Cir. 1987); *United States v. Dalmer*, 994 R.2d 537, 539 (8th Cir. 1993) and *Long v. Iowa*, 920 F.2d 4, 6 (8th Cir. 1990).

Petitioner was charged herein with a sexual assault in state court in the small rural community of Salisbury, North Carolina. (Pet. App. A p.1) After a pretrial hearing, the Petitioner's trial counsel told him he was going to attempt to negotiate with the prosecutor. (Pet. App. D p.15a) Thereafter, Petitioner ingested multiple doses of the muscle relaxer "Xanax". (Pet. App. D p.15a) His trial lawyer then returned with a plea offer. (Pet. App. D p.15a) The plea negotiated was for a lesser offense but required an active sentence of 46-65 months of incarceration. (Pet. App. D p.11a). At the plea hearing that day Petitioner was incoherent and now cannot recall the specifics of the proceedings. (Pet. App. D p.15a). When he cleared his head the day after the plea was entered, the Petitioner informed his mother that he wanted to withdraw the plea or entered an Appeal. (Pet. App. D p.15a)

In the post-conviction motion filed below, the Petition reported the above facts and specifically alleged that his conviction was obtained in violation of his Due Process rights. (Pet. App. D) He raised these claims in a timely filed and procedurally correct post-conviction motion before the Superior Court of North Carolina where the plea had been entered. (Pet. App. D) However, the post-conviction Court summarily denied relief without a hearing. (Pet. App. A).

Petitioner attempted to obtain discretionary review of the Post-conviction rulings before both the North Carolina Court of Appeals and the North Carolina Supreme Court but such a review was not granted in either Appellate tribunal. (Pet. App. B, C) Petitioner now comes before this Court and seeks relief from these constitutional deprivations.

Petitioner made a valid claim that rights secured by the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution were violated when the trial Court accepted his guilty plea while he was under the influence of drugs. The recitation of facts in his post-conviction pleadings were sufficient to raise a good faith claim of constitutional magnitude. He reported he was so intoxicated that he was incoherent and that he cannot recall the plea proceedings. The Petitioner has made sufficient allegations to warrant a hearing on his claim.

In Sanders v. United States, 373 U.S. 1, 19-20 (1963), this Court held that an evidentiary hearing is required when a Petitioner claimed that his plea was not voluntary because he was under the influence of drugs at the plea hearing. *Id.* The majority reasoned that the post-conviction claim could not be resolved absent a hearing, even if the post-trial motion was before the same judge who conducted the plea hearing, because the facts on which the claim was predicated are outside the record. *Id* at 19-20.

Numerous Appellate courts have consistently reiterated that when a credible claim of a constitutional deficiency is based on facts outside of the record, the

post-conviction Court must conduct an evidentiary hearing on the claim. *United States v. Booth*, 432 F.3d 542, 546 (3rd Cir. 2005); *United States v. Weatherwax*, 20 F.3d 572, 560 (3rd Cir. 1994); *United States v. White*, 366 F.3d 291, 297 (4th Cir. 2004); *Bumgardner v. United States*, 758 F.3d 1292, 1293 (8th Cir. 1985); and *Arnold v. United States*, 63 F.3d 778, 781 (9th Cir. 1994); (hearing required on claim the counsel did not file Appeal as instructed).

This principle also has been held applicable to post-conviction proceedings by the Courts of North Carolina. *State v. Hardison*, 126 N.C. App. 52, 54, 483 S.E. 2d 459, 461 (1997); *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E. 2d 719, 721, (1985).

Having established a prima facia claim that his plea was not voluntary and thus his incarceration results from a violation of his right to Due Process, Petitioner requests that he finally be granted an opportunity to present evidence to support his claim. At its core, Due Process is the right to be heard on a claim made in good faith.

Therefore, this Court should remand this matter to the Post-Conviction Court below with instructions to conduct the mandated hearing on this Constitutional Due Process violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LYLE J. YURKO
Attorney for Petitioner
YURKO & ASSOCIATES, P.A.
402 W. Trade St., Ste. 101
Charlotte, NC 28202
(704) 347-0407

APPENDIX

APPENDIX A — ORDER OF THE STATE OF NORTH CAROLINA, COUNTY OF ROWAN, GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION DATED AUGUST 16, 2006

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 03 CRS 58828, 03 CRS 59747,
04 CRS 773-74

STATE OF NORTH CAROLINA
COUNTY OF ROWAN

STATE OF NORTH CAROLINA

VS.

JOSHUA LEWIS JOHNSON

DEFENDANT.

ORDER

THIS MATTER coming on to be heard before the undersigned Judge of the Superior Court of Rowan County upon a paper-writing purported to be a "Motion for Appropriate Relief", filed May 19, 2006 in the office of the Clerk of Superior Court of Rowan County. From said paper-writing and the records on file, the Court finds the following facts:

(1) That the defendant was indicted for Second Degree Rape, Second Degree Sexual Offense, Intimidating a State's Witness and First Degree Kidnapping.

(2) That the trial of these matters was set for the week of May 23, 2005, and various motions were heard over two days prior to jury selection; that the presiding Judge was the Honorable Mark E. Klass.

(3) That the subject matter of the State's Motion and the Defendant's Motion that was heard during these several days involved potential testimony which allegedly fell within N.C.G.S. 8C-1, Rule 412 ("Rape Shield")

(4) That as required by Rule 412, Judge Klass conducted an *in camera* hearing regarding the proffered testimony on the subject matter. After hearing from numerous witnesses on this issue, the Court ruled that none of the evidence proffered by the defense was admissible. That prior to the trial actually beginning, Mr. Johnson's attorney, James A. Davis, and the Assistant District Attorney worked out a plea bargain wherein Mr. Johnson would plead guilty to Attempted Second Degree Rape in exchange for the state's dismissal of all remaining charges. That Mr. Johnson pled guilty to the Attempted Second Degree Rape charge and received a sentence of a minimum of 46 months and a maximum of 65 months. That the defendant in the Transcript of Plea under oath stated under Paragraph 4A that he was not under the influence of alcohol, drugs, narcotics, medicine, pills, or any other

intoxicants at the present time and the last time he had used any such substances was one week ago. That the Court in accepting the plea found that there was a factual basis for the entry of the plea; that the defendant was satisfied with his lawyer; that the defendant was competent to stand trial and that the plea was in full choice of the defendant and was made freely, voluntarily and understandingly. Thereafter, the Court accepted the plea and ordered it be recorded and the defendant was determined to be guilty. After hearing evidence recited by the State, the defendant was found to be a Prior Record Level 2 for Felony convictions and the Court found one aggravating factor, that is, the defendant had a support system in the community and the Court determined that mitigating factors outweighed the aggravation and the Court sentenced the defendant in a mitigated range. That this was a Class D Felony and he was sentenced in the mitigated range of a Class D Felony, Level 2.

(5) That the defendant in this matter in his Motion for Appropriate Relief alleges that he had ineffective assistance of counsel and also that his plea of Guilty was not valid in that he alleges that he ingested multiple Zanax pills prior to the plea and that his plea was not knowing and voluntarily pursuant to *Boykin vs. Alabama.*

Appendix A

The Court having read the paper-writing and reviewed the allegations contained therein, finds the following facts: That the defendant in Transcript of Plea stated that he was not under the influence of any alcohol or drugs at the time of the plea and the Court so found that in entering the Transcript of Plea; the Court further finds that the defendant had a fair and partial trial and that none of his constitutional or other legal rights were denied or violated in any respect before or during his trial; that the judgment and sentence of the Court entered is legal, valid and proper and is entered in full compliance with Due Process of Law by a court of competent jurisdiction, and the same is in all respects ratified, confirmed and approved, and is in full compliance with the provisions of the Constitution of the United States and the laws and Constitution of North Carolina; that the defendant was represented by very competent counsel who afforded him effective, reasonable and professional representation throughout the proceedings and that there are no allegations that can be believed or support any contention that the defendant was denied Due Process of Law by being represented by an alleged ineffective assistance of counsel, and the defendant had not shown by any allegations or otherwise that his said counsel's representation fell below an objective standard of reasonableness, and further has failed to show that there is a reasonable probability that were it not for his counsel's alleged ineffective assistance, the results of the proceedings would have been different. Specifically it is concluded that it has not been shown that trial counsel made serious errors that produced an unfair, unreliable

result and that said counsel was diligent and ethical in handling of the case in this matter.

The Court having read the paper-writing and reviewed and considered the applicable records on file, finds as a fact that the allegations contained in the purported paper-writing set forth no probable grounds for relief, either in law or in fact, by way of Habeas Corpus, Post-Conviction Hearing or Motion for Appropriate Relief, and the Court does further find that the paper-writing does not allege in substance, the facts required by law for an Application for Writ of Habeas Corpus, Post-Conviction Hearing or Motion for Appropriate Relief, and that said paper-writing does not set forth the statutory requirements for the Application for a Writ of Habeas Corpus, Post-Conviction Hearing or Motion for Appropriate Relief.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion of the defendant for relief from his conviction be **denied** and **dismissed**.

It is further ordered that the defendant's failure to assert any other grounds in this motion shall be subject to being treated in the future as a **BAR** to any other claims, assertions, petitions or motions that he may hereafter file in this case pursuant to the G. S. 15A-1419.

A copy of this order shall be mailed to the defendant's attorney, S. Aaron Marshall, Yurko and Associates, 402 West Trade Street, Suite 101, Charlotte, NC 28202,; to William Kenerly, District Attorney,

Salisbury, NC; to James A. Davis, Attorney at Law, Salisbury, NC; and to the Commissioner of Corrections, 835 West Morgan Street, Raleigh, NC 27602.

This the 16th day of August, 2006

s/ Larry G. Ford
Larry G. Ford
Judge of the Superior Court

APPENDIX B — ORDER OF THE NORTH CAROLINA COURT OF APPEALS DATED FEBRUARY 6, 2007

No. COAP07-42

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

V

JOSHUA LEWIS JOHNSON

Petitioner

ORDER

The following order was entered:

The petition filed in this cause on the 17th day of January 2007 and designated "Petition for Writ of Certiorari" is denied.

By order of the Court this the 6th day of February 2007.

The above order is therefore certified to the Clerk of Superior Court Rowan County. Witness my hand and official seat this the 6th day of February 2007.

s/ John H. Connell
John H. Connell
Clerk of North Carolina Court of Appeals

APPENDIX C — ORDER OF THE SUPREME COURT OF NORTH CAROLINA DATED OCTOBER 11, 2007

SUPREME COURT OF NORTH CAROLINA

No. 433P07

STATE OF NORTH CAROLINA

v.

JOSHUA LEWIS JOHNSON

ORDER

Upon consideration of the petition filed by Defendant on the 5th day of September 2007 in this matter for a writ of certiorari to review the order of the Superior Court, Rowan County, the following order was entered and is hereby certified to the Superior Court of that County:

"Dismissed by order of the Court in conference, this the 11th day of October 2007.

s/ Hudson, J.
For the Court"

Appendix C

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of October 2007.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

APPENDIX D — MOTION FOR APPROPRIATE RELIEF DATED MAY 19, 2006

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03 CRS 058828

STATE OF NORTH CAROLINA
COUNTY OF ROWAN

STATE OF NORTH CAROLINA,

Plaintiff,

v.

JOSHUA LEWIS JOHNSON

Defendant,

Motion for Appropriate Relief

NOW COMES the defendant, by and through his attorney, S. Aaron Marshall, and hereby moves, pursuant to N.C.G.S. 15A-1415, for appropriate relief from a conviction recorded on May 25, 2005 in the above captioned case. The appropriate relief prayed for is that the resulting conviction be set aside and thereafter the above captioned case be set for retrial. Mr. Johnson also requests this court that he be given additional time to file his notice of appeal.

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Facts

1. Joshua Johnson was charged with one count of Second Degree Rape, one count of Second Degree Sexual Offense, one count of First Degree Kidnapping, all with a date of offense of November 9, 2003, and one count of Intimidating a State's Witness with dates of offense between November 9 and November 24, 2003.

2. At the time of the offense Mr. Johnson and the victim, Jillian Mauldin, were involved in a romantic relationship.

3. The alleged incident took place inside the apartment of Mr. Johnson.

4. Before the trial was about to start, Mr. Johnson's attorney, James A. Davis, and the Assistant District Attorney worked out a plea bargain where Mr. Johnson would plead guilty to Attempted Second Degree Rape in exchange for the State's dismissal of all remaining charges. Mr. Johnson, accordingly, pled guilty to the Attempted Second Degree Rape charge and received a sentence of 46 – 65 months.

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Grounds for Appropriate Relief

The grounds upon which relief is warranted are pursuant to 15A-1415 (b) (3) and in support of this motion, the undersigned shows unto the Court the following:

1. The conviction was obtained in violation of the Constitution of the United States and the defendant's Sixth Amendment right to counsel. The defendant's recognized right to counsel is the right to the effective assistance of counsel. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970), *Strickland v. Washington*, 466 U.S. 668 (1984), *State v. Braswell*, 312 N.C. 553. The conviction was also obtained in violation of the defendant's Fifth Amendment right to due process of the law. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

2. Mr. Davis made numerous errors in the handling of the case, including counseling Mr. Johnson to accept the plea bargain that was entered in this case.

3. On December 12, 2003 Ms. Mauldin wrote out a victim impact statement in which she claimed she had not had sexual intercourse with anyone since the alleged incident with Mr. Johnson. During the pretrial proceedings Ms. Mauldin testified that she started a sexual relationship with Jonathan Bakalli "sometime in December" after they had been dating for a few weeks. This sexual

relationship ultimately led to Ms. Mauldin becoming pregnant and having an abortion. Transcript of Plea Proceeding p.17.

4. Previous to dating Mr. Johnson, Ms. Mauldin had been in a sexual relationship with Mikey Antosek. On one occasion during this relationship the couple made a videotape of themselves having sexual intercourse with each other. Mr. Antosek retained the videotape of the sexual intercourse. During the Pretrial proceedings Brent Alexander testified that after the videotape was made Mr. Antosek told him that Ms. Mauldin and her sister had to come to Mr. Antosek and told him that if he did not give the videotape back to her Ms. Mauldin was going to file some type of rape charge against him. Transcript of Plea p.23.

5. Ms. Mauldin testified during the pretrial proceedings that she had tried to commit suicide on August 18, 2003 by ingesting an entire bottle of muscle relaxers. This was right before she met Mr. Johnson. Transcript of Pica Proceeding p.20.

6. Ms. Mauldin claimed Mr. Johnson hit her over the head with a clock radio during the alleged assault. Plea Transcript p.131. The medical report from the physical exam of Ms. Mauldin taken at 8:36 a.m. five hours after the alleged assault showed no bruising on the head or neck. The report also indicated that the posterior fourchette, the area posterior adjacent to the

vagina, showed no tears or signs of trauma. This was not consistent with a violent assault.

7. During the pretrial proceedings numerous witnesses were put on the stand by the State for the purpose of showing that Mr. Johnson had a history of aggression toward women he was dating. These incidents were clearly out of the context of the subject matter of this case.

   a. In one incident Mr. Johnson assaulted members of the Concord Police Department after he had gotten into a disagreement with his girlfriend, Shanna Swicegood, and allegedly grabbed her arm. Plea Transcript p.62. This evidence tended only to show that Mr. Johnson was aggressive when approached by police officers. This incident would have had no bearing on whether or not Mr. Johnson sexually assaulted his girlfriend on the occasion in question.

   b. Other witnesses were called to testify that Mr. Johnson and Erica Parsons had an ongoing relationship in which he abused her on more than one occasion. Erica Parsons was not put on the stand during the pretrial proceedings but she indicated to Mr. Johnson that she would testify that he never abused her in any manner.

8. On the day that the plea was entered Mr. Johnson and Mr. Davis had a discussion about working out a plea with the State. Mr. Johnson indicated to Mr. Davis that he would accept a plea to an Assault charge but that he would not accept pleading guilty to any charge having to do with sexual assault. Mr. Davis then went to discuss the plea with the prosecutor. At this time Mr. Johnson took multiple Xanax pills he had brought with him to court. When Mr. Davis returned he informed Mr. Johnson that the best deal he could get was to plead guilty to Attempted Second Degree Sexual Assault. He told Mr. Johnson that if he didn't take this plea the State was going to try and "boxcar" him with consecutive sentences on the Sexual Assault and Kidnapping charge because they "hated him." He told Mr. Johnson that he would serve at least twenty years in prison if he did not take this deal. Not being of sound mind and faced with the prospect of a guaranteed loss, Mr. Johnson took the plea.

9. During the plea proceeding Mr. Johnson was incoherent and now doesn't remember much of what happened during the court proceeding.

10. Mr. Johnson, after regaining a soundness of mind, contacted his mother, Judy Johnson, from prison and told her he wanted to withdraw his plea. He told Ms. Johnson to contact Mr. Davis and alert him to this fact. Ms. Johnson contacted

Mr. Davis and told him that Mr. Johnson wanted to withdraw his plea, or at the least enter an appeal. Mr. Davis assured Ms. Johnson that he would come visit with Mr. Johnson. He never came to see Mr. Johnson in prison or contact him in regards to the withdrawal of the plea or an Appeal. Consequently the plea was not withdrawn and no appeal was ever entered on behalf of Mr. Johnson.

11. The sum total of the evidence in the case was clearly not enough for Mr. Johnson to be convicted on these charges. Mr. Davis' actions in this case in recommending Mr. Johnson take the plea that was offered in spite of the medical evidence regarding Ms. Mauldin and the character evidence regarding Ms. Mauldin and her past sexual relationships and psychological condition at the time of the alleged incident, as well as not following through with the appeal process in any manner, clearly fall below the standard of effective assistance as outlined in *Strickland v. Washington*, 466 U.S. 668 (1984).

12. Mr. Johnson's plea of guilty was not valid in that due to his ingestion of the multiple xanax pills his waiver of trial rights could not be knowing and voluntary pursuing to *Boykin v. Alabama*, 395 U.S. 238 (1969), and as required by the Fifth Amendment to the United States Constitution and the Constitution laws of the State of North Carolina.

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WHEREFORE, based upon the foregoing, the defendant hereby moves this Court for the above requested Appropriate Relief.

Respectfully Submitted this the 19th day of May, 2006

s/ S. Aaron Marshall
S. Aaron Marshall
Yurko and Associates
402 West Trade Street, Suite 101
Charlotte, NC 28202
(704) 347-0407

APPENDIX E — STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

28 USCS § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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Amendment 4 - Search and Seizure.
***Ratified* 12/15/1791.**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 - Trial and Punishment, Compensation for Takings.
***Ratified* 12/15/1791.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person ***be subject for the same offense to be twice put in jeopardy of life or limb***; nor shall be compelled in any criminal case to be a witness against himself, nor be ***deprived*** of life, liberty, or property, without *due process* of law; nor shall private property be taken for public use, without just compensation.

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Amendment 14 - Citizenship Rights.
Ratified* 7/9/1868. *Note History

1. All persons born or naturalized in the United States, and subject to the ***jurisdiction*** thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State ***deprive*** any person of life, liberty, or property, without ***due process*** of law; nor deny to any person within its ***jurisdiction*** the equal protection of the laws.

2. Representatives shall be ***apportioned*** among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.